



COMMONWEALTH of VIRGINIA

Office of the Governor

Mark R. Warner
Governor

William H. Leighty
Chief of Staff

July 30, 2004

MEMORANDUM

TO: Heads of Executive Branch Agencies, Independent Agencies, and
Institutions of Higher Education

C: The Governor's Cabinet

FROM: William H. Leighty

SUBJECT: SWAM Procurement

This memorandum addresses Governor Warner's plans for increasing state procurement from small, women-owned, and minority-owned (SWAM) businesses. Normally I would distribute this type of information through the Leadership Communiqué. However, because of the high priority that Governor Warner places on this topic, I am distributing this to you directly. This memorandum supplements and supercedes a memorandum dated July 6, 2004 that you may have received from DMBE.

Executive Order 29, issued in July 2002 by Governor Warner, established the framework for the participation of small businesses and businesses owned by women and minorities in the Commonwealth's purchasing programs. Since EO 29 was issued, the Commonwealth has made significant progress towards diversifying its supply chain. For example, the 3rd Quarter FY 04 SWAM Procurement Report showed that, over the last 7 quarters, purchases from minority-owned vendors had risen from 1.57% to 2.55% and from women-owned vendors from 0.93% to 2.10%. However, the progress we are making is slow and unsatisfactory.

The Governor has now approved certain key recommendations of the Intersecretarial Task Force on Minority Procurement. These recommendations both continue and expand the thrust of EO 29 by directing agencies to adopt more specific and extensive remediation strategies. These strategies are based in

significant part on the findings of the *Procurement Disparity Study of the Commonwealth of Virginia* prepared earlier this year by MGT of America.

I have attached to this memorandum those recommendations that you and your agency or institution need to implement. In particular, note that the recommendations include statewide aspirational procurement goals for small, women and minority businesses. Your agency or institution will need to develop a specific plan for achieving your particular SWAM procurement goals, and complete that plan by September 1, 2004 where possible, and no later than October 1, 2004. Each institution and agency's plan will likely vary from the state goals, and that is to be expected. This is not a one-size fits all situation. However, we expect the sum of the agency/institution plans to reflect the overall state aspirational goals, so be sure to push for plans that help us achieve these important goals.

Your procurement officers will be concerned about the relationship of the SWAM procurement rules and goals and the Virginia Public Procurement Act (VPPA) and other procurement rules. SB 598 adopted by the 2004 General Assembly provides that, when purchases are made under a remedial plan established by the Governor, they may be partially exempt from the VPPA. Therefore, the Department of General Services/Division of Purchasing and Supply will soon distribute changes to the Agency Procurement and Surplus Property Manual. Entities such as VITA, decentralized institutions, and independent agencies will need to adopt similar changes to their rules and procedures.

Please note that the SWAM procurement rules do not direct or encourage agencies or institutions to accept a bad business deal or a lower quality vendor, product or service in order to meet SWAM goals. To the contrary, these SWAM rules specifically state that quality, price and terms should not be sacrificed in any meaningful way in order to achieve our SWAM procurement goals. I am confident that we can achieve these SWAM goals without reducing quality or increasing costs.

If you have questions about these rules generally or about preparing your plan, please call DMBE for assistance. For example, there may be a procurement category of importance to your agency/institution but your purchasers have been unable to identify minority vendors. DMBE can help in identifying those vendors. DMBE can be reached by calling Ed Hamm or Jean Bass at 786-6585. Or perhaps your agency/institution has questions about how to implement the new procurement rules regarding small purchases or issues regarding construction contracts. DMBE and DGS can help with these issues. At DGS, you can call Rich Sliwoski for the construction contract issues and Ron Bell for other

questions. They can be reached at 804-786-3311. For technology purchases, Susan Wooley at VITA can provide guidance. Susan can be reached at 804-343-9004.

Thank you for your help in achieving these important procurement goals.

Attachment Below

July 2004

SWAM Procurement Programs

to be

Implemented by Agencies and Institutions

A. Aspirational Goals

1. **Statewide Goals.** Based on the Procurement Disparity Study, the Governor has adopted the statewide aspirational procurement goals set forth below. The percentage goals set forth below apply to the dollar value of the applicable contracts and procurements.
 - a. Small Business Procurement Goal: Adopt a statewide aspirational small business goal of 40% combined prime and sub contracts with the state.
 - b. In those procurement areas identified in the Disparity Study as having a minority availability above 1.0%, adopt the following specific statewide aspirational procurement goals for minority and women-owned businesses: **(Please note that the following detailed goals are statewide goals and not individual agency goals, see paragraph A 2 for an explanation.)**

Construction Prime Contractors

AA*	3.56%
NW*	5.56%
HA*	1.47%

Construction Sub Contractors

AA	5.03%
HA*	3.73%
AsA*	2.02%
NW	6.95%

A&E and Professional Services Prime Contractors

AA	4.97%
HA	2.48%
AsA	4.97%
NW	16.04%

Other Services – Prime Contractors

AA	8.52%
HA	2.51%
AsA	4.30%
NW	21.72%

Goods and Supplies

AA	4.23%
HA	1.51%
AsA	5.08%
NW	17.33%

* AA means African American

*NW means Non-minority women

*HA means Hispanic American

*AsA means Asian American

2. **Agency Plans.** Each agency and institution of the Commonwealth shall adopt an annual SWAM Procurement Plan that will specify that agency's or institution's plans and goals for SWAM procurement. Each agency's initial SWAM Procurement Plan shall be completed by September 1, 2004 where possible and in any event by September 15, 2004. **Note: agency SWAM procurement plans should include overall goals for establishing a “best effort” of purchasing from minority business vendors and you do not need to be establish agency goals broken down by ethnicity, as are the statewide goals.** To assist agencies in developing their SWAM Procurement Plans, DMBE will develop and distribute plan guidelines that agencies may follow. Because of differences in the available vendors and goods and services purchased by various agencies and institutions, it is anticipated that each agency's and institution's SWAM Procurement Plan will vary according to that agency's or institution's particular procurement circumstances. Some agency plans will call for SWAM procurement at levels below the statewide aspirational goals, and some will call for procurement at levels above the statewide aspirational goals. One size will not fit all. Where applicable and verifiable, "second tier" SWAM participation should be considered by agencies and institutions in preparing their agency plans in those circumstances where such second tier participation is assured by contract or other firm arrangement.
3. **Publication of Results.** Beginning with the 4th Quarter FY04 report, the quarterly SWAM Reports shall be made electronically and publicly available on the DMBE website, delineated by Secretariat and by agency and institution.

4. **Management Evaluation.** Progress toward achievement of an agency's or institution's SWAM Procurement Plan shall be included in the evaluation criteria for the chief executive officer for each such agency and institution, and shall be included by such chief executive officer in the evaluation criteria for their applicable senior management and procurement personnel.

B. Certification

Certification of SWAM vendors is necessary in order to obtain accurate and easily accessible data on SWAM Procurement and to assure a consistent and appropriate approach to compliance issues. In the past, many SWAM vendors saw no benefit in becoming certified so failed to do so. These new programs will provide important incentives to SWAM vendors to encourage them to become certified.

1. **Certified Vendors.** Beginning October 1, 2004, for the purposes of state procurement rules, no vendor shall be considered a Small Business Enterprise, a Minority Owned Business Enterprise or a Women-Owned Business Enterprise, or be entitled to the benefits of the state SWAM procurement opportunities, unless certified as such by the Commonwealth. All certified SWAM vendors shall be assigned a specific identification number, and through that process, standardized reports will be able to be generated from CARS, eVA and other state reporting systems. No vendor shall be required to certify under this program and no vendor shall be excluded from doing business with the Commonwealth because of their failure to certify as a SWAM vendor; provided, however, a qualified vendor who fails to certify shall be disqualified for participation in the applicable SWAM procurement programs.
2. **Definitions.** The definitions set forth below shall be applicable to SWAM vendors doing business with the Commonwealth, although federal definitions shall govern with respect to meeting federally funded highway construction and other applicable federally financed programs goals, and that, to the extent necessary, the Governor proposes legislation to codify these definitions for the purpose of this SWAM procurement program.

Minority-Owned Business Enterprise: A business concern which is at least 51 percent owned by one or more minorities or in the case of a corporation, partnership or limited liability company or other entity, at least 51 percent of the equity ownership interest in which is owned by one or more minorities and whose management and

daily business operations are controlled by one or more of such individuals.

Minority Individual: "Minority" means a person who is a citizen of the United States or a legal resident alien and who satisfies one or more of the following definitions:

"Asian Americans" means all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian subcontinent, or the Pacific Islands, including but not limited to Japan, China, Vietnam, Samoa, Laos, Cambodia, Taiwan, Northern Marinas, the Philippines, U. S. territory of the Pacific, India, Pakistan, Bangladesh and Srilanka and who are regarded as such by the community of which these persons claim to be a part.

"African Americans" means all persons having origins in any of the original peoples of Africa and who are regarded as such by the community of which these persons claim to be a part.

"Hispanic Americans" means all persons having origins in any of the Spanish speaking peoples of Mexico, South or Central America, or the Caribbean Islands or other Spanish or Portuguese cultures and who are regarded as such by the community of which these persons claim to be a part.

"Native Americans" means all persons having origins in any of the original peoples of North America and who are regarded as such by the community of which these persons claim to be a part or who are recognized by a tribal organization.

"Eskimos and Aleuts" means all persons having origins in any of the peoples of Northern Canada, Greenland, Alaska, and Eastern Siberia and who are regarded as such in the community of which these persons claim to be a part.

Small Business Enterprise: "Small business enterprise" shall mean an independently owned and operated business which, together with affiliates, has 250 or fewer employees, or average annual gross receipts of \$10 million or less averaged over the previous three years. Nothing in this provision prevents a program, agency, institution or subdivision from complying with the qualification criteria of a specific state program or a federal guideline to be in compliance with a federal grant or program.

Woman-Owned Business Enterprise: A business concern which is at least 51 percent owned by one or more women who are U.S.

citizens or legal resident aliens, or in the case of a corporation, partnership or limited liability company or other entity, at least 51 percent of the equity ownership interest in which is owned by one or more women, and whose management and daily business operations are controlled by one or more of such individuals.

Disadvantaged Business Enterprise: A small business concern which is at least 51 percent owned by one or more socially and economically disadvantaged individuals, or, in the case of any corporation, partnership or limited liability company or other entity, at least 51 percent of the equity ownership interest in which is owned by one or more socially and economically disadvantaged individuals and whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it.

C. **Contract Sizing**

The size of a proposed procurement can limit the potential participation by SWAM vendors. The following rules are designed to address that issue, while being sure to preserve the cost-savings and other benefits that the Commonwealth has achieved through bundling contracts and other procurement initiatives.

1. **Assessing Bundled Contracts.** For goods provided under statewide or regionally bundled contracts for which there are qualified available SWAM vendors, but with respect to which the size of such contract appears to limit SWAM vendors from bidding or winning such contracts, the contracting agency or institution seek to reduce the size of the contracts to increase the pool of potential bidders to include SWAM vendors. If the effect of reducing the size of such contracts is to cause a meaningful increase in price, a significant degradation in terms and conditions, a significant decrease in administrative efficiency or non-compliance with applicable federal contracting requirements or funding conditions, then the contracting agency or institution shall not be obligated to so reduce the contract size.
2. **Prime Contractor SWAM Procurement Plan.** Any contracting agency or institution that has established a SWAM Procurement Plan with identified goals for minority and women-owned business procurement, may include those goals as conditions or pre-qualification requirements in the terms and conditions for the award of any prime contract in excess of \$100,000 and, if so included, may reflect those goals in the requirement for a subcontracting plan prepared and submitted prior to award for

goods and non-professional services and within 30 days of award for construction and professional services. For contracts in which the subcontractor plan is due prior to award, failure to submit the plan in timely fashion shall disqualify the contractor from receiving the award. For contracts in which the subcontractor plan may be submitted within 30 days after award, failure to submit the required plan in timely fashion, including any applicable cure periods, shall be cause for contract termination or other appropriate remedies (including the obligation on the part of the contractor to continue full contract performance notwithstanding the withholding of progress payments until the required plan is submitted). A Virginia-certified M/W contractor who serves as prime contractor will receive credit for M/W subcontracting for work performed by such prime.

3. **Construction Contracts.** If the size of vertical or horizontal construction contracts appear to limit SWAM vendors from bidding or winning such contracts, then the contracting agency seek to reduce the size of the contracts to increase the pool of potential SWAM bidders. If the effect of reducing the size of such contracts is to cause a meaningful increase in price, a significant degradation in terms and conditions, a significant decrease in administrative efficiency or non-compliance with applicable federal contracting requirements or funding conditions, then the contracting agency or institution shall not be obligated to so reduce the contract size. In the case of construction contracts awarded to non-SWAM primes, the prime contractor shall seek to size the subcontracts so as to enable qualified SWAM subcontractors to bid effectively for such work so long as the effect of reducing the size of such subcontracts does not cause a meaningful increase in price or a significant degradation in terms, conditions or other applicable contract factors. In the case of non-highway construction, where appropriate for the construction job in question, the Commonwealth shall consider using a Construction Manager At Risk instead of a prime contractor in order to afford opportunities for M/W contractors to bid effectively for the work in question. Nothing contained in this paragraph shall require the contracting agency to accept contractors who do not meet applicable quality, safety and performance standards.
4. **Small Procurements.** The current procurement regulations have been modified to provide that for all small procurements under \$5,000, at least one M/W Vendor be solicited. Procurement regulations applicable to IFBs and RFPs for amounts up to \$100,000 that require solicitation of multiple vendors have been modified to permit award to a reasonably priced M/W Vendor or highest

ranking offer that is other than the lowest priced vendor when such purchases are made by a public body that has established a SWAM Procurement Plan.

5. **Consultation with DMBE.** Each contracting agency or institution, in consultation with DMBE where practical, shall seek to identify those purchases in which contract sizing may influence the availability of purchasing opportunities to SWAM vendors (a "Size-Related Contract"). Where these purchases are identified, the agency shall determine whether there are M/W Vendors capable of meeting the purchasing requirements. If the agency identifies no M/W Vendors capable of performing the contract requirements, then the agency shall consult with DMBE to seek to identify available M/W Vendors unless contract timing issues require the agency or institution to complete the contract process before DMBE input can be obtained. For any Size-Related Contract for which the agency or institution determines that contract timing issues require contract award without identifying any M/W Vendors or consultation with DMBE, the agency or institution shall consult with DMBE promptly after award of the contract to develop potential M/W Vendors for the next similar procurement.
6. **Evidence of Compliance.** Each prime contractor who wins an award in which provision of a SWAM procurement plan is a condition to the award, shall deliver to the contracting agency or institution, on or before request for final payment, evidence and certification of compliance (subject only to insubstantial shortfalls and to shortfalls arising from subcontractor default) with the SWAM procurement plan. Final payment under the contract in question may be withheld until such certification is delivered and, if necessary, confirmed by the agency or institution, or other appropriate penalties may be assessed in lieu of withholding such payment.

D. Increasing Availability

The Disparity Study demonstrates that there is a low availability of minority firms in Virginia, relative both to the minority population in Virginia and to the availability of minority firms in adjoining states.

1. **Increasing Number of Available M/W Firms.** State agencies and institutions shall work together with DMBE and DBA to seek to increase the number of qualified M/W vendors who are available to do business with the Commonwealth. If state agencies or institutions are having difficulty in identifying sufficient available

M/W vendors for particular areas of procurement, then those agencies and institutions shall work with their vendor organizations, DMBE and DBA in order to identify additional M/W vendors.

2. **Improved Data Access.** As soon as reasonably possible, in addition to its normal contract postings, each agency and institution shall post or provide accessible links to procurement information on eVA, VBO and VITA websites, in easily accessible form and in a location identified for SWAM procurement, including notices of contract opportunities. These postings will include (a) all existing term contracts with expiration dates, with such expiration dates clearly identified, (b) anticipated IFBs and RFPs that have not yet been developed including a best estimate of the date of issue of such IFBs and RFPs and contact information for potential vendors for pre-issuance contract information, and (c) other anticipated contract opportunities. This site shall be linked to the DMBE website.

E. Other

Audits. In order to assure compliance with certification requirements, SWAM subcontracting plans, and the other provisions set forth above, the contracting or certifying agency or institution, in cooperation with DMBE and DGS, shall contractually provide for appropriate auditing of vendors and contracts. Such audits shall include the right to make on site audits at any time during the term of the applicable contract or certification.